

RAY ROTHBARD

IBLA 97-188

Decided March 23, 1998

Petitions for award of damages, refund of fees, and award of costs and expenses, including attorney fees, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and implementing regulations. IBLA 94-279, 95-79.

Petitions dismissed.

1. Equal Access to Justice Act: Generally--Equal Access to Justice Act: Adversary Adjudication

A petition for award of costs and expenses under the Equal Access to Justice Act, including attorney fees, is denied because it rests on an agency decision that was not the result of an adversary adjudication required by statute.

APPEARANCES: Ray Rothbard, Bend, Oregon, pro se; Marianne King, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Ray Rothbard has filed a petition for award of damages arising from a mining contest hearing and his subsequent appeal to this Board, reported as Ray Rothbard, 137 IBLA 159 (1996). He also asks that fees paid by him to the Bureau of Land Management (BLM) be refunded and that attorney fees and other expenses be awarded pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994), as amended, and implementing regulations. At Rothbard's request, the Board has expedited consideration of his petitions for relief.

The Rothbard Decision affirmed a mining contest Decision invalidating the Rainbow mining claims then held by Rothbard. Consolidated with the contest Decision on appeal was the separate appeal of a BLM notice of noncompliance issued to Rothbard (IBLA docket number 94-259), which was affirmed, but which included a notice to cease and desist, which was vacated. Petitions to reconsider the Board's Decision were rejected on February 25, 1997, and May 21, 1997.

On February 3, 1997, Rothbard requested payment of \$32,760,000 in damages on account of lost production from his Rainbow claims. On March 3, 1997, he filed a request for refund of \$2,400 in fees said to have been paid in 1994 to BLM on account of the claims. On June 9, 1997, alleging his net worth was less than \$150,000, he filed a request under the EAJA for attorney fees and other expenses in the amount of \$32,760,000, again explaining that his request for payment rested on the estimated value of his invalidated claims. His petition does not list any attorney fees that he has incurred, nor does it state any compensable expenses claimed under the EAJA. For reasons explained below, these petitions must all be rejected.

The damage claim cannot be considered by this Board, which exercises only the authority conferred by the Secretary of the Interior at 43 C.F.R. § 4.1(b)(3). The authority to award damages is not included in that delegation of authority. See B.H. Northcutt, 75 IBLA 305, 307 (1983). As a consequence, the claim for \$32,760,000 in damages must be dismissed because it exceeds our jurisdiction.

The claim for refund of \$2,400 is apparently based upon fees paid to BLM for maintenance or rental fees on the Rainbow claims during 1994. This matter was not raised before us in the related appeals considered in the Rothbard Decision. Whether there may be a refund of the fee payments made will depend upon the nature of the payments and must await issuance of a decision by BLM on the question. The refund request is not properly before us, therefore, and must be dismissed as prematurely filed.

[1] Rothbard's claim for relief under the EAJA rests on his perceived success with reference to the cease and desist order. This order was not, however, issued in connection with the contest proceeding, but was part of an action taken by BLM independent of the validity determination concerning the Rainbow claims.

In order to recover fees and expenses under the EAJA, an applicant must be a prevailing party in an "adversary adjudication." 5 U.S.C. § 504(a)(1) (1994). Implementing the EAJA, Departmental regulation 43 C.F.R. § 4.603 reiterates the requirement that only "adversary adjudications" that are "required by statute to be determined on the record after opportunity for an agency hearing" will provide a basis for payment of attorney fees and expenses under the EAJA. Application for payment of fees under the EAJA may only be made in cases conducted under 5 U.S.C. § 554 (1994), which are required by statute to be determined on the record after opportunity for an agency hearing. 43 C.F.R. § 4.603(a).

Rothbard's fee application therefore lacks a foundation in law, because the cease and desist order was included in a notice of noncompliance issued by BLM to prevent degradation of the public lands under authority provided by 43 U.S.C. § 1732(b) (1994). No requirement for hearing is provided by that statute; the regulation under which the notice was issued, 43 C.F.R. § 3809.3-2, does not require such a hearing, and none was held.

The petition for relief under the EAJA must also, therefore, be dismissed, because it does not arise from an adversary adjudication that was required by statute. See 43 C.F.R. § 4.603(a).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petitions for damages, refund of fees paid, and petition for attorney fees, costs, and expenses under the EAJA are dismissed.

Franklin D. Arness
Administrative Judge

I concur in dismissal of the petitions:

James L. Burski
Administrative Judge